No. —

In The
Supreme Court of the United States

LOUIS GERARD GOERES,

Petitioner,

v.

CHARLES SCHWAB & CO., INC., SCHWAB RETIREMENT PLAN SERVICES, INC., and ADMINISTRATIVE COMMITTEE OF THE SCHWABPLAN RETIREMENT SAVINGS AND INVESTMENT PLAN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

TERESA S. RENAKER
JEFFREY GREG LEWIS
Counsel of Record
MARGARET E. HASSELMAN
LEWIS, FEINBERG, LEE, RENAKER & JACKSON, P.C.
1330 Broadway, Suite 1800
Oakland, CA 94612
(510) 839-6824

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Section 502(a)(3) of the Employee Retirement Income Security Act of 1974 ("ERISA") authorizes suit by a plan participant or beneficiary for "equitable relief" from a violation of the statute. Petitioner Goeres sought monetary relief to make him whole for losses he suffered in the retirement plan account of which he was the beneficiary, allegedly due to a sixteen-month delay by the plan's fiduciaries in recognizing him as the beneficiary. The courts below held that even if Mr. Goeres proved that the plan's fiduciaries breached the duties they owed him under ERISA, the statute would afford him no remedy for the breach. The question presented affects the rights of all participants in ERISA-governed plans who are injured by breaches of fiduciary duty that harm them personally but do not harm the plans in which they participate.

The Question Presented is:

Does "equitable relief" under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), include make-whole monetary relief against an ERISA plan fiduciary to remedy individual harm suffered by a plan participant or beneficiary due to the fiduciary's breach of obligations imposed by ERISA?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
RELEVANT STATUTORY PROVISION	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	7
I. The Nature of "Equitable Relief" Available Against a Breaching Fiduciary Is a Significant and Recurring Remedial Issue That Has Generated Pervasive Confusion and Conflicting Results in the Lower Courts	7
II. In Analyzing the Relief Available Against Breaching Fiduciaries, the Lower Courts Have Persistently Failed to Apply the Historical Inquiry Mandated by This Court, Resulting in Erroneous Denial of Relief That Was Typically Available in Equity	13
III. Alternatively, the *Mertens* Standard Requiring That Relief Have Been "Typically Available in Equity" Is Incorrect and Unworkable; Correctly Interpreted, Section 502(a)(3) Authorizes All Relief Available Against a Fiduciary for Breach of Trust	19
CONCLUSION	22

TABLE OF AUTHORITIES

Page

CASES

Aetna Health Inc. v. Davila, 542 U.S. 200 (2004)..... 9, 10

Allinder v. Inter-City Prods. Corp. (USA), 152 F.3d 544 (6th Cir. 1998)..... 9

Armstrong v. Jefferson Smurfit Corp., 30 F.3d 11 (1st Cir. 1994).....12, 16

Bast v. Prudential Ins. Co. of Am., 150 F.3d 1003 (9th Cir. 1998) 12

Bowerman v. Wal-Mart Stores, Inc., 226 F.3d 574 (7th Cir. 2000) 10

Brosted v. Unum Life Ins. Co. of Am., 421 F.3d 459 (7th Cir. 2005) 22

Brown v. Aventis Pharmaceuticals, Inc., 341 F.3d 822 (8th Cir. 2003).....11

Calhoon v. Trans World Airlines, Inc., 400 F.3d 593 (8th Cir. 2005) 10

Callery v. United States Life Ins. Co. in the City of New York, 392 F.3d 401 (10th Cir. 2004) 16

Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc., 472 U.S. 559 (1985)..... 20

Cicio v. Does, 321 F.3d 83 (2d Cir. 2003)..... 9

Crosby v. Bowater Inc. Retirement Plan for Salaried Employees of Great Northern Paper Inc., 382 F.3d 587 (6th Cir. 2004)..... 17

DiFelice v. Aetna U.S. Healthcare, 346 F.3d 442 (3d Cir. 2003)..... 9

Donovan v. Bierwirth, 680 F.2d 263 (2d Cir. 1982) 2

TABLE OF AUTHORITIES – Continued

Page

Farr v. U.S. West Communications, Inc., 151 F.3d 908 (9th Cir. 1998) 12

Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989) 20

FMC Medical Plan v. Owens, 122 F.3d 1258 (9th Cir. 1997) 4

Gerbec v. United States, 164 F.3d 1015 (6th Cir. 1999) 19

Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002) ..... *passim*

Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238 (2000) 20

Krohn v. Huron Memorial Hosp., 173 F.3d 542 (6th Cir. 1999) 10

LaRue v. DeWolff, Boberg & Assocs., 450 F.3d 570 (4th Cir. 2006) 12, 17, 21

LaRue v. DeWolff, Boberg & Assocs., Inc., 127 S. Ct. 1393 (2007) 2, 9

Mass. Mutual Life. Ins. Co. v. Russell, 473 U.S. 134 (1985) 20

Mathews v. Chevron Corp., 362 F.3d 1172 (9th Cir. 2004) 21

McDonald v. Household Intern., Inc., 425 F.3d 424 (7th Cir. 2005) 9

McDonald v. HSBC Finance Corp., 2006 WL 2193072 (S.D. Ind. Aug. 1, 2006) 9

McLeod v. Oregon Lithoprint Inc., 102 F.3d 376 (9th Cir. 1996) 7, 10, 16

TABLE OF AUTHORITIES – Continued

Page

Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545 (1928) 3

Mertens v. Hewitt Assocs., 508 U.S. 248 (1993) ..... *passim*

Pegram v. Herdrich, 530 U.S. 211 (2000) 3

Peralta v. Hispanic Business, Inc., 419 F.3d 1064 (9th Cir. 2005) 7, 11, 12

Pereira v. Farace, 413 F.3d 330 (2d Cir. 2005) 16

Qualchoice, Inc. v. Rowland, 367 F.3d 638 (6th Cir. 2004) 5

Sereboff v. Mid Atlantic Medical Services, Inc., 126 S. Ct. 1869 (2006) ..... *passim*

Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983) 2

Slice v. Sons of Norway, 34 F.3d 630 (8th Cir. 1994) 4

Varity Corp. v. Howe, 516 U.S. 489 (1996) 3, 20

Westaff (USA) Inc. v. Arce, 298 F.3d 1164 (9th Cir. 2002) 5

STATUTES

ERISA § 2(b), 29 U.S.C. § 1001(b) 2

ERISA § 404(a), 29 U.S.C. § 1104(a) 6

ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1) 2, 3

ERISA § 502, 29 U.S.C. § 1132 ..... 1, 3

ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES (1973) 15

John H. Langbein, *What ERISA Means by "Equitable": The Supreme Court's Trail of Error in* Russell, Mertens, *and* Great-West, 103 COLUMBIA L. REV. 1317 (2003) 10, 18, 19, 20, 21

Dana M. Muir, *Fiduciary Status as an Employer's Shield: The Perversity of ERISA Fiduciary Law*, 2 U. PA. J. OF LABOR & EMPLOYMENT LAW 391 (2000) 10

JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE (5th ed. 1941) 13, 14, 15

RESTATEMENT (SECOND) OF TRUSTS (1959) 14, 15, 18

APPENDIX

Opinion of the United States Court of Appeals for the Ninth Circuit, Decided February 14, 2007 ..... App. 1

Memorandum Opinion and Order of the United States District Court for the Northern District of California, Filed September 28, 2004 ..... App. 3

PETITION FOR WRIT OF CERTIORARI

Petitioner Louis Gerard Goeres respectfully petitions for a writ of certiorari to review the decision of the U.S. Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The order of the U.S. Court of Appeals for the Ninth Circuit (Pet. App. 1–2) is found at 2007 WL 495191 (9th Cir. Feb. 14, 2007). The order of the district court (Pet. App. 3–14) is found at 2004 WL 2203474, 33 Employee Benefits Cas. 2302 (N.D. Cal. Sept. 28, 2004).

STATEMENT OF JURISDICTION

The U.S. Court of Appeals for the Ninth Circuit issued its order on February 14, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

Section 502 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132, as amended, provides in relevant part:

> (a) A civil action may be brought –
>
> * * *
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain

> other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan.

STATEMENT OF THE CASE

1. This case raises the frequently litigated but unresolved issue of whether monetary relief may be equitable relief available for breach of the fiduciary obligations imposed by ERISA on persons who administer employee benefit plans.[1] ERISA comprehensively regulates employee benefit plans sponsored by private employers. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). A primary goal of the statute is to protect "the interests of participants in employee benefit plans and their beneficiaries . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." ERISA § 2(b), 29 U.S.C. § 1001(b).

The obligations of a plan fiduciary to the participants and beneficiaries of the plan "are those of trustees of an express trust – the highest known to the law." *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir.), *cert. denied*, 459 U.S. 1069 (1982). In particular, ERISA requires that a plan fiduciary act solely in the interest of the plan's participants and beneficiaries. ERISA § 404(a)(1), 29

[1] This Court recently invited the Solicitor General to file a brief expressing the views of the United States in a case presenting the same question. *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 127 S. Ct. 1393 (2007).

U.S.C. § 1104(a)(1). This duty of loyalty is "[t]he most fundamental duty owed by the trustee to the beneficiaries of the trust," *Pegram v. Herdrich*, 530 U.S. 211, 224 (2000) (internal quotation marks omitted), demanding "[n]ot honesty alone, but the punctilio of an honor the most sensitive," *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928) (Cardozo, J.).

2. ERISA establishes not only standards of fiduciary conduct but, equally importantly, a mechanism for enforcing those standards. Section 502, ERISA's enforcement mechanism, provides the exclusive means of enforcing rights and obligations under the statute. 29 U.S.C. § 1132. Section 502(a)(3) authorizes an action by an individual participant or beneficiary (1) to enjoin an act or practice that violates ERISA, or (2) to obtain other appropriate equitable relief to redress the violation or to enforce ERISA. 29 U.S.C. § 1132(a)(3). Section 502(a)(3) permits an action for breach of fiduciary duty where the relief flows to the participant or beneficiary individually, rather than to the plan as a whole. *Varity Corp. v. Howe*, 516 U.S. 489, 512 (1996). This Court has denominated Section 502(a)(3) ERISA's "catchall" provision, meant to "act as a safety net, offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy." *Id.* Section 502(a)(3) gives force to ERISA's objective of protecting the interests of plan participants and beneficiaries, because "it is hard to imagine why Congress would want to immunize breaches of fiduciary obligation that harm individuals by denying injured beneficiaries a remedy." *Id.* at 513.

3. This Court has three times taken up the meaning of "equitable relief" in Section 502(a)(3), but only in the context of relief against nonfiduciaries, unlike the relief

against fiduciaries sought in this case. In *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993), this Court first addressed the nature of the "equitable relief" available under Section 502(a)(3) for violations of ERISA, holding that "equitable relief" is the relief that was typically available in equity in the days of the divided bench. *Id.* at 256. The Court held that monetary relief *against a nonfiduciary* for knowing participation in a fiduciary breach, rather than being typically equitable, was legal relief, and therefore unavailable under Section 502(a)(3). *Id.* at 255.

Mertens led some courts to mis-cast the inquiry into the equitable nature of requested relief as an inquiry into "the *substance of the remedy* sought" and to hold that where the substance was money, the relief was not available. *FMC Medical Plan v. Owens*, 122 F.3d 1258, 1261 (9th Cir. 1997) (holding that "monetary relief is not available under" Section 502(a)(3) where plan fiduciary sought to enforce plan reimbursement provision against participant); *accord Slice v. Sons of Norway*, 34 F.3d 630, 633 (8th Cir. 1994) (holding that monetary relief was not available where participant relied on fiduciary's misstatement of pension benefit amount in deciding to retire).

This Court rejected the "substance of the remedy" approach in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 216 (2002), another case involving relief against a nonfiduciary. *Great-West Life* instructs instead that relief "typically available in equity" be identified by "the conditions that equity attached to its provision." *Id.* The proper sources of information about the conditions for equitable relief are "standard current works such as Dobbs, Palmer, Corbin, and the Restatements, which make the answer clear." *Id.* at 217. As the Secretary of Labor explained in the court below,

> *Great-West* thus significantly clarified the Court's earlier decision in *Mertens*. Like *Mertens*, *Great-West* also did not involve a suit to recover monetary damages from a fiduciary. But while *Mertens* was ambiguous on the availability of such relief in equity, *Great-West* makes it abundantly clear that examination of the historical practice of the equity courts is required to determine whether monetary relief against a fiduciary was "typically available."

Brief of the Secretary of Labor as Amicus Curiae in Support of the Appellant and Requesting Reversal in *Goeres v. Charles Schwab & Co., Inc., et al.* (9th Cir. No. 05-15282), at 11–12 (hereinafter "DOL *Goeres* Brief").[2]

Despite this clarification, after *Great-West*, some courts continued to reject claims for monetary relief under Section 502(a)(3) because the substance of the relief was monetary. *See, e.g., Westaff (USA) Inc. v. Arce*, 298 F.3d 1164, 1166 (9th Cir. 2002), *cert. denied*, 537 U.S. 1111 (2003); *Qualchoice, Inc. v. Rowland*, 367 F.3d 638, 646, 650 (6th Cir. 2004), *cert. denied*, 544 U.S. 942 (2005). In *Sereboff v. Mid Atlantic Medical Services, Inc.*, 126 S. Ct. 1869 (2006), another decision arising from a Section 502(a)(3) claim against a nonfiduciary, this Court abrogated these decisions, emphasizing that monetary relief may be available where "the basis for [the] claim is equitable." *Id.* at 1874. *Sereboff* authorized monetary relief on the basis of an equitable lien by agreement. *Id.* at 1875.

4. Mr. Goeres' case presents a paradigmatic example of a claim for which the basis is equitable and on which

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[2] *Available at* http://www.dol.gov/sol/media/briefs/goeres(A)-07-11-2005.pdf (last visited May 13, 2007).

monetary relief was typically available in equity, as well as a fact pattern that is repeated over and over in litigation involving employee benefit plans. According to the allegations of the complaint, which were accepted as true by the courts below, Mr. Goeres was designated as a beneficiary under the SchwabPlan Retirement Savings and Investment Plan ("Plan") by his domestic partner, Stephen M. Ward. Pet. App. 3. Mr. Ward executed the beneficiary designation in 1992 and it was countersigned by a Plan representative. Pet. App. 3–4. In January 2000, Mr. Goeres notified the Plan's fiduciaries of Mr. Ward's death. Pet. App. 4. The fiduciaries incorrectly informed Mr. Goeres that he was *not* Mr. Ward's beneficiary. *Id.*

Sixteen months later, in May 2001, the fiduciaries corrected their position, informing Mr. Goeres that he was the beneficiary and providing him with an application for distribution of Mr. Ward's Plan account. *Id.* However, the fiduciaries failed to adequately explain Mr. Goeres' distribution options as a non-spouse beneficiary. Pet. App. 5. By the time Mr. Goeres finally received his distribution, the Plan account had lost more than 50% of its value. *Id.*

Mr. Goeres filed suit, asserting that the Plan's fiduciaries had violated their duties to him under ERISA § 404(a), 29 U.S.C. § 1104(a) and seeking relief under Section 502(a)(3). Looking to the "substance of the remedy sought," Judge Breyer of the Northern District of California determined that Mr. Goeres' claim was one for money damages unavailable under Section 502(a)(3). Pet. App. 8–9. The district court specifically relied on the Ninth Circuit's pre-*Great-West* holding that "'the status of a defendant, whether fiduciary or nonfiduciary, does not affect the question of whether damages constitute "appropriate equitable relief" under'" Section 502(a)(3). Pet. App. 10

(quoting *McLeod v. Oregon Lithoprint Inc.*, 102 F.3d 376, 378 (9th Cir. 1996), *cert. denied*, 520 U.S. 1230 (1997)). The district court concluded,

> No matter how he characterizes it, plaintiff seeks to recover for the loss of the value of the Retirement Plan due to defendants' negligence. This claim for relief is legal, not equitable. Unfortunately, the Supreme Court has held that legal relief is not available under ERISA section 1132(a)(3). Therefore, plaintiff's claim fails as a matter of law.

Id. The Ninth Circuit affirmed for the reasons stated by the district court, concluding that this Court's intervening *Sereboff* decision did not undermine the district court's reasoning and that the reasoning was supported by the Ninth Circuit's intervening decision in *Peralta v. Hispanic Business, Inc.*, 419 F.3d 1064, 1076 (9th Cir. 2005). Pet. App. 1–2. This petition follows.

REASONS FOR GRANTING THE WRIT

I. The Nature of "Equitable Relief" Available Against a Breaching Fiduciary Is a Significant and Recurring Remedial Issue That Has Generated Pervasive Confusion and Conflicting Results in the Lower Courts.

The Government, judges (including members of this Court), and respected commentators agree that the question presented in this case is one of major significance for the nation's private employee benefits system, the system on which most Americans rely for their retirement income, health care, and other necessities of economic and physical

well-being.[3] This Court should grant the writ to resolve this important and recurring question.

1. The Secretary of Labor has already expressed in the court below her view that "[t]his case presents a significant and recurring remedial issue: whether section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), permits beneficiaries to recover monetary losses from fiduciaries who have breached their duties and caused harm to the beneficiaries." DOL *Goeres* Brief, at 1. In addition to the brief in the court below, the Secretary of Labor has presented the same view on this question in this Court and many lower courts over several years.[4] As noted above, this Court recently invited the United States to present its views on

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[3] According to the United States Department of Labor's Employee Benefits Security Administration, 150 million Americans are covered by more than 700,000 private retirement plans, 2.5 million health plans, and similar numbers of other welfare benefit plans. http://www.dol.gov/ebsa/aboutebsa/main.html (last visited May 13, 2007).

[4] *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Petitioners in *Aetna Health Inc. v. Davila*, 2003 WL 23011479, at *27 n.13 (Dec. 18, 2003); Brief for the Secretary of Labor as Amicus Curiae Supporting Appellant's Petition for Panel and En Banc Rehearing in *Pereira v. Farace* (2d Cir. Nos. 03-5035, 03-5055) (July 25, 2005), *available at* http://www.dol.gov/sol/media/briefs/pereirabrief.htm (last visited May 13, 2007); Brief of the Secretary of Labor as Amicus Curiae in Support of Plaintiff-Appellant Urging Reversal in *Coan v. Kaufman* (2d Cir. No. 04-5173), 2005 WL 5071038, at *18–26 (Mar. 25, 2005); Brief of the Secretary of Labor As Amicus Curiae in Support of the Appellant and Reversal of the District Court in *Callery v. United States Life Ins. Co. in the City of New York* (10th Cir. No. 03-4097), 2003 WL 24309395 (Aug. 21, 2003); Amended Brief of the Secretary of Labor as Amicus Curiae Opposing the Motions to Dismiss in *Tittle v. Enron* (S.D. Tex. No. H-01-3913), 2002 WL 32157092, at 51 (Sept. 3, 2002); Brief of the Secretary of Labor as Amicus Curiae in Support of the Appellant in *Ostler v. OCE-USA, Inc.* (7th Cir. No. 01-8301) (Feb. 8, 2002), *available at* http://www.dol.gov/sol/media/briefs/ostlervOCE(A)-2-8-2002.htm (last visited May 13, 2007).

the petition for a writ of certiorari in another case presenting this question. *LaRue*, 127 S. Ct. at 1393.

2. Justice Ginsburg has "join[ed] 'the rising judicial chorus urging that Congress and [this] Court revisit what is an unjust and increasingly tangled ERISA regime.'" *Aetna Health Inc. v. Davila*, 542 U.S. 200, 222 (2004) (Ginsburg, J., concurring) (quoting *DiFelice v. Aetna U.S. Healthcare*, 346 F.3d 442, 453 (3d Cir. 2003) (Becker, J., concurring)) (alteration in original). In the current "untenable" situation, broad preemption of state-law claims couples with a cramped interpretation of Section 502(a)(3) to produce rights without remedies. *Id.*[5]

As recognized in the *Davila* concurrence, this situation can be ameliorated by recognizing that make-whole monetary relief against a breaching fiduciary was typically available in equity at the time of the divided bench – the position taken by the United States in *Davila*, this case, and many other cases – or by "fresh consideration of the availability of consequential damages under § 502(a)(3)" consistent with traditional trust-law remedies. *See* §§ II, III, *infra*; *see also Cicio v. Does*, 321 F.3d 83, 106–07 (2d Cir. 2003) (Calabresi, J., dissenting in part) (calling for this Court to "start over" in its analysis of the availability of consequential damages under ERISA), *vacated*, 542 U.S. 933 (2004); *see also McDonald v. Household Intern., Inc.*,

[5] Dismissal of state-law claims on preemption grounds followed by dismissal of ERISA claims for lack of a remedy creates a *"Catch 22"* for plan participants. *McDonald v. HSBC Finance Corp.*, 2006 WL 2193072 at *1 (S.D. Ind. Aug. 1, 2006), *motion to certify appeal granted*, 2006 WL 2669950 (S.D. Ind. Sept. 18, 2006), *cert. denied*, 127 S. Ct. 1380 (2007). Other courts have termed this situation "betrayal without a remedy." *See, e.g., Allinder v. Inter-City Prods. Corp. (USA)*, 152 F.3d 544, 553 (6th Cir. 1998), *cert. denied*, 525 U.S. 1178 (1999).

425 F.3d 424, 430 (7th Cir. 2005) (suggesting that plaintiffs "take note" of *Davila* concurrence in framing ERISA claims on remand).

3. Scholars likewise have expounded on the significance of the question whether monetary relief is available against breaching fiduciaries under Section 502(a)(3) and have called upon this Court to examine the question. *See* John H. Langbein, *What ERISA Means by "Equitable": The Supreme Court's Trail of Error in* Russell, Mertens, *and* Great-West, 103 COLUMBIA L. REV. 1317, 1365 (2003) (hereinafter Langbein); Dana M. Muir, *Fiduciary Status as an Employer's Shield: The Perversity of ERISA Fiduciary Law*, 2 U. PA. J. OF LABOR & EMPLOYMENT L. 391, 461–62 (2000).

4. In the absence of guidance from this Court, the lower courts have reached inconsistent results regarding the availability of make-whole monetary relief in cases of breach of fiduciary duty under ERISA. For example, in *McLeod*, the court held that there was no remedy available under Section 502(a)(3) where the employer-fiduciary failed to inform the employee of her eligibility to participate in a benefit plan. 102 F.3d at 378. In contrast, in *Krohn v. Huron Memorial Hosp.*, 173 F.3d 542 (6th Cir. 1999), the court remanded for issuance of an order that a fiduciary pay the benefits that the participant would have received had the fiduciary provided her with correct information about her benefits. *Id.* at 552. In *Calhoon v. Trans World Airlines, Inc.*, 400 F.3d 593, 598 (8th Cir. 2005), medical plan participants on COBRA continuation coverage could not recover for medical expenses they incurred when their coverage lapsed due to a fiduciary's failure to process an address change. Yet in *Bowerman v. Wal-Mart Stores, Inc.*, 226 F.3d 574, 592 (7th Cir. 2000), a

medical plan participant was permitted to tender the COBRA premium that she would have paid but for misinformation provided by a fiduciary, upon which she would receive reimbursement for medical expenses she had incurred as a result of the loss in coverage, and in *Brown v. Aventis Pharmaceuticals, Inc.*, 341 F.3d 822, 827–28 (8th Cir. 2003), the court affirmed an order for an employer to purchase life insurance for a former employee to place her in the position that she would have occupied but for the employer's failure to notify her of her right to convert her group life insurance coverage.

5. In an attempt to ameliorate the situation created by its own and other circuits' erroneous readings of this Court's decisions, the Ninth Circuit opined in *Peralta* that the availability of monetary relief in fiduciary breach cases turns not on an examination of the historical practice of equity as directed by this Court, but on the perceived extent of the fiduciary's wrongdoing:

> There seems to be little problem in providing an avenue for the payment of benefits if serious procedural errors result in the denial of benefits; and in a case such as *Varity,* where fraud is involved, the courts will go to great lengths to find a vehicle for reinstatement of benefits via a § 1132(a)(3) equitable remedy. . . .
>
> * * *
>
> Individual substantive relief under ERISA is available where an employer actively and deliberately misleads its employees to their detriment. In such cases, wrongs will be undone and means found to make benefits available, as in *Varity, Blau* [*v. Del Monte Corp.*, 748 F.2d 1348 (9th Cir. 1984)] and *Hozier* [*v. Midwest Fasteners,*

> *Inc.*, 908 F.2d 1155 (3d Cir. 1990)]. Even where benefits are not available under the applicable plan, "appropriate" equitable relief may be awarded. *See, e.g., Varity,* 516 U.S. at 515.

Peralta, 419 F.3d at 1074–75 (footnote omitted). The *Peralta* court opined that Congress provided a remedy in Section 502(a)(3) for "egregious behavior" but not for "merely negligent administration." *Id.* at 1076.

While appealing in its promise that Section 502(a)(3) can be manipulated to find remedies for egregious wrongs, this reasoning finds no support in Section 502(a)(3), *Mertens, Great-West, Sereboff*, or even the Ninth Circuit's own precedents. For example, in one case, the employer breached its fiduciary duty by deliberately misleading plan participants regarding the taxability of distributions under an early retirement program, causing losses to the participants, but the court held that no remedy was available under Section 502(a)(3). *Farr v. U.S. West Communications, Inc.*, 151 F.3d 908, 915–16 (9th Cir. 1998), *amended by* 179 F.3d 1252 (9th Cir. 1999), *cert. denied*, 528 U.S. 1116 (2000). *Farr*, numerous other decisions,[6] and this case all demonstrate that the lack of guidance on the meaning of "equitable relief" in the fiduciary context

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[6] *See, e.g., Armstrong v. Jefferson Smurfit Corp.*, 30 F.3d 11, 12–13 (1st Cir. 1994) (allegation that employer intentionally withheld information regarding taxability of lump-sum payments to disabled retirees failed to state a claim because no relief available under Section 502(a)(3)); *Bast v. Prudential Ins. Co. of Am.*, 150 F.3d 1003, 1009 (9th Cir. 1998), *cert. denied*, 528 U.S. 870 (1999) (no remedy where fiduciary breached its duty by delaying approval of medical benefits, resulting in beneficiary's death); *LaRue v. DeWolff, Boberg & Assocs.*, 450 F.3d 570, 575 (4th Cir. 2006), *cert. pending*, No. 06-856 (no remedy for losses to retirement savings resulting from fiduciary's failure to follow investment instructions).

frequently leaves plan participants and beneficiaries without a remedy even for egregious breaches of fiduciary duty. As the Secretary of Labor pointed out below, the restrictive reading of "equitable relief" applied by the courts in this case "leave[s] beneficiaries without any remedy for serious violations of ERISA's fiduciary provisions, in conflict with the statutory scheme." DOL *Goeres* Brief, at 22–23.

6. This case is the ideal vehicle for this Court to answer the pressing need to examine Section 502(a)(3) and provide guidance to the lower courts on the recurring, unresolved question of the availability of make-whole monetary relief against breaching fiduciaries.

II. In Analyzing the Relief Available Against Breaching Fiduciaries, the Lower Courts Have Persistently Failed to Apply the Historical Inquiry Mandated by This Court, Resulting in Erroneous Denial of Relief That Was Typically Available in Equity.

The historical inquiry mandated by *Great-West* has rarely been touched on, let alone conducted, by the lower courts. That inquiry demonstrates that monetary relief against a breaching fiduciary and in favor of an injured beneficiary was typically available in courts of equity. Yet in this case and many others, the courts have failed to examine the "conditions that equity attached to the provision" of the requested relief. *See Great-West,* 534 U.S. at 216.

1. Historically, the remedies of a trust beneficiary against a trustee were uniquely and exclusively equitable. *See* DOL *Goeres* Brief, at 5–6, 12–16; 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE, § 150a, pp.

204–05 (5th ed. 1941) (hereinafter "POMEROY"); RESTATEMENT (SECOND) OF TRUSTS, § 197 (1959) (hereinafter "REST. 2D"). A trust beneficiary has no legal remedies against a trustee because the beneficiary has no legal interest in the subject matter of the trust. REST. 2D, §§ 2, 197.

In cases within equity's exclusive jurisdiction, arising out of express trusts, equity courts awarded remedies that in a non-trust case might be viewed as legal in nature: "It often happens that the *final* relief to be obtained by the *cestui que trust* consists in the recovery of money. This remedy the courts of equity will always decree when necessary." *Id.* at § 158, p. 215. According to Pomeroy, a trust beneficiary "has the following *equitable remedies*: 'The beneficiary of a trust can maintain a suit . . . to compel the trustee to redress a breach of trust.'" POMEROY at § 1080, p. 229, n.15 (quoting RESTATEMENT OF TRUSTS, § 199) (emphasis added). The trustee's liability on such a claim "is always sufficient for the complete indemnification and compensation of the beneficiary." *Id.* at p. 229. Thus, by definition, a remedy decreed in favor of a beneficiary against a breaching trustee was a non-legal remedy, because it came within the exclusive jurisdiction of equity, and law courts entirely lacked the power to award such relief.

2. In *Mertens*, this Court focused not on remedies against a breaching fiduciary, which were exclusively equitable, but on legal remedies available in equity courts under their concurrent jurisdiction. *Mertens*, 508 U.S. at 256. The Court quoted from the following passage of Pomeroy:

> [W]hen a court of equity has jurisdiction over a cause for any purpose, it may retain the cause

> for all purposes, and proceed to a final determination of all the matters at issue. . . . For this reason, if the controversy contains any equitable feature or requires any purely equitable relief which would belong to the exclusive jurisdiction . . . the court may go on to a complete adjudication, and may thus establish purely legal rights and grant legal remedies which would otherwise be beyond the scope of its authority.

POMEROY at § 181, p. 257; *see Mertens*, 508 U.S. at 256. This principle is known as the "clean-up doctrine." Dan B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES: DAMAGES – EQUITY – RESTITUTION, § 2.7, p. 83 (1973) (citing POMEROY, §§ 231–42) (hereinafter "DOBBS"). Thus, *Mertens* explained that historically, "there were many situations – not limited to those involving enforcement of a trust – in which an equity court could 'establish purely legal rights and grant legal remedies which would otherwise be beyond the scope of its authority.'" *Mertens,* 508 U.S. at 256; *see Great-West,* 534 U.S. at 210 (stating that *Mertens* "rejected a reading of the statute that would extend the relief obtainable under § 502(a)(3) to whatever relief a court of equity is empowered to provide in the particular case at issue (which could include legal remedies that would otherwise be beyond the scope of the equity court's authority).").

In short, *Mertens* and *Great-West* clearly exclude from "appropriate equitable relief" any remedies borrowed from law courts pursuant to the clean-up doctrine. Remedies decreed against breaching fiduciaries, however, originated in and were exclusive to equity. There were no such remedies to be borrowed from the law courts, because the law courts lacked the power to grant any remedy for a breach of trust due to the equitable nature of the fiduciary relationship. REST. 2D, § 197. In *Great-West*'s terms, the

existence of the fiduciary relationship was a "condition that equity attached" to the provision of monetary relief for breach of trust; in *Sereboff*'s terms, "the basis for [the] claim is equitable" because a claim for breach of trust is an equitable claim. *Great-West*, 534 U.S. at 216; *Sereboff*, 126 S. Ct. at 1874.

3. Because they have failed to conduct the historical inquiry required by *Great-West*, the lower courts, including the courts in this case, have mistakenly concluded that the fiduciary status of the defendant does not affect the availability of make-whole monetary relief under Section 502(a)(3). For example, before *Great-West*, the First Circuit wrote that "the status of the defendant (i.e., fiduciary or nonfiduciary) does not affect the question of whether compensatory legal damages constitute 'appropriate equitable relief' under the statute." *Armstrong*, 30 F.3d at 13 (cited in *McLeod*, 102 F.3d at 378).

This notion, which was not supported by *Mertens*, has carried over into post-*Great-West* decisions, including the decision in this case. *See, e.g., Pereira v. Farace*, 413 F.3d 330, 340 (2d Cir. 2005), *cert. denied*, 126 S. Ct. 2286 (2006); *Callery v. United States Life Ins. Co. in the City of New York*, 392 F.3d 401, 409 (10th Cir. 2004), *cert. denied*, 126 S. Ct. 333 (2005). The historical inquiry mandated by *Great-West* demonstrates that the status of the defendant "affects the question" whether "compensatory damages" are legal or equitable relief, because such relief against a breaching fiduciary was exclusively equitable.

4. Some lower courts have seized on the *Great-West* Court's statement that "[i]n *Mertens*, we rejected the claim that the special equity-court powers applicable to trusts define the reach of § 502(a)(3)" as demonstrating that the

fiduciary status of the defendant does not affect the available relief. *See Great-West,* 534 U.S. at 219; *see also LaRue*, 450 F.3d at 576; *Crosby v. Bowater Inc. Retirement Plan for Salaried Employees of Great Northern Paper Inc.*, 382 F.3d 587, 596 (6th Cir. 2004), *cert. denied*, 544 U.S. 976 (2005). But the special equity-court powers deemed non-typical in *Mertens* were the powers to award legal remedies under the clean-up doctrine. *See Mertens,* 508 U.S. at 256. Beneficiaries, such as Mr. Goeres, suing fiduciaries for breach of trust had no need of the clean-up doctrine because relief in such cases was exclusively equitable. Lower courts, including the courts in this case, have failed to recognize that fiduciary status is a condition that equity attached to the provision of make-whole monetary relief.

As the *Mertens* Court explained, "All that ERISA has eliminated . . . is the common law's joint and several liability, for *all* direct and consequential damages suffered by the plan, on the part of persons who had no real power to control what the plan did" – that is, nonfiduciaries. *Id.* at 262. The Court noted that limiting liability in this way would protect nonfiduciary service providers from high insurance costs that would be passed on to plans, thus balancing the goals of protecting plan participants and containing pension costs. *Id.* at 262–63.

5. This case exemplifies the situation in which an equity court, and only an equity court, could and would have granted equitable relief to place the beneficiary in the position he would have occupied but for the breach. Mr. Goeres seeks to recover only his direct economic loss from the breach, that is, the difference between the value of the Plan account on the date he would have received his

distribution but for the breach, and the decreased value on the date he received it due to the fiduciaries' delay.

"If the trustee commits a breach of trust, he is chargeable with . . . any loss or depreciation in value of the trust estate resulting from the breach of trust." REST. 2D, § 205.[7] The illustrations to Restatement § 205 repeatedly demonstrate that the trustee is liable for any depreciation in the value of the trust that results from his negligence, even where he is not enriched. In this case, the value of the trust declined between the time that Mr. Goeres should have received his distribution and the time when, as a result of the fiduciaries' negligence, he did receive it. The fiduciaries are liable for the difference, and this remedy is exclusively equitable. Equity courts had the power to award monetary relief to make a beneficiary whole for breach of trust. This remedy was not borrowed from the law courts but originated in equity, and this remedy depended on the fiduciary status of the defendant because the claim arose out of the fiduciary relationship.

6. As the Secretary of Labor explained below, excluding make-whole monetary relief from the "equitable relief" available under Section 502(a)(3) in the fiduciary context "is neither consistent with ERISA's remedial purpose, nor compelled by *Mertens* or *Great-West*. Whatever ambiguity *Mertens* left on the matter, *Great-West* clarifies by referring the courts to the historical practice of the equity courts at the time of the divided bench." DOL *Goeres* Brief, at 23. This Court should grant certiorari in

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[7] As Professor Langbein points out, the phrase "chargeable with" derives from the equitable term for damages, "surcharge." Langbein, at 1352–53 & n.208.

this case to clarify that such make-whole relief against breaching fiduciaries was typically available in equity and is "equitable relief" within the meaning of Section 502(a)(3).

III. Alternatively, the *Mertens* Standard Requiring That Relief Have Been "Typically Available in Equity" Is Incorrect and Unworkable; Correctly Interpreted, Section 502(a)(3) Authorizes All Relief Available Against a Fiduciary for Breach of Trust.

The trust-law origins of ERISA dictate that equitable relief under Section 502(a)(3) incorporates the well-established, traditional remedies of a beneficiary against a breaching fiduciary, including make-whole monetary relief. If *Mertens*, as clarified by *Great-West* and *Sereboff*, cannot be interpreted to allow make-whole monetary relief against a breaching fiduciary as described above, then the question presented in this case provides the Court with an opportunity to revisit *Mertens* and return Section 502(a)(3) remedies to the trust-law framework that Congress intended. As Professor Langbein has demonstrated in his frequently cited article on Section 502(a)(3), this Court's departure from the trust-law basis of ERISA in its seminal remedies cases has profoundly frustrated Congress's objective of coupling the fiduciary obligations of the trustee of an express trust with effective remedies to enforce those duties. Langbein, at 1318–54.[8]

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[8] In general, "academics and legal commentators have been extremely critical of the holding espoused in *Mertens* because of its narrow scope and unjust result." *Gerbec v. United States*, 164 F.3d 1015, 1024 (6th Cir. 1999) (collecting commentaries).

1. This Court has emphasized that in interpreting ERISA it will be "guided by principles of trust law" due to the clear legislative history stating Congress's intent to incorporate these principles into the statute. *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 111 (1989); *see Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570 (1985); *Varity*, 516 U.S. at 496 (recognizing that fiduciary duties under ERISA "draw much of their content from the common law of trusts, the law that governed most benefit plans before ERISA's enactment"); *Mass. Mutual Life. Ins. Co. v. Russell*, 473 U.S. 134, 152–53 (1985) (Brennan, J., concurring) ("Congress intended by § 404(a) to incorporate the fiduciary standards of trust law into ERISA.").

Thus, this Court has recognized that "[w]hen federalizing the administration of pension and employee benefit plans in ERISA, Congress made a deliberate choice to subject these plans to the pre-existing regime of trust law rather than to invent a new regulatory structure." Langbein, at 1319. Accordingly, trust law provides the starting point for the analysis of "appropriate equitable relief" in § 502(a)(3) claims. *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 250 (2000).

2. The *Mertens* majority departed from this trust-law framework. *Mertens* "rejected the claim that the special equity-court powers applicable to trusts define the reach of § 502(a)(3)." *Great-West*, 534 U.S. at 219. In place of well-established, traditional trust-law remedies, *Mertens* substituted the novel category of "relief typically available in equity," a standard that the majority acknowledged represented an "unlikely" interpretation of ERISA. *Mertens*, 508 U.S. at 257. The category of relief "typically

available in equity" exists nowhere outside of *Mertens*. It has "no ascertainable meaning." Langbein, at 1353.

The *Mertens* majority failed to populate this category with any meaningful exemplars. As Professor Langbein has demonstrated, none of the majority's three examples – injunction, mandamus, and restitution – explains what relief is "equitable relief" within the meaning of Section 502(a)(3). *Id.* at 1353–54. Injunction is separately provided for in Section 502(a)(3), mandamus is a legal remedy, and restitution, as this Court subsequently recognized in *Great-West*, can be legal or equitable depending on the underlying cause of action. *Id.* at 1353–58; *Great-West*, 534 U.S. at 214–15. Yet the lower courts have clung to these three examples as "archetypes," *LaRue*, 450 F.3d at 575, because the concept of relief "typically available in equity" gives no guidance in deciding what relief is "appropriate equitable relief" and what is not.

3. *Great-West*, *Sereboff*, and the profusion of conflicting lower-court decisions pre- and post-dating them demonstrate the imprudence of the *Mertens* Court's departure from the trust-law paradigm. The ahistorical distinction between equitable relief and money damages,[9] the artificial characterization of monetary relief as "instatement" or reinstatement into a plan,[10] and the confusion of equitable with legal restitution have created what

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[9] "[I]t may once have been technically correct to say that damages were exclusively a common law remedy, but only because damages in equity were called surcharge." Langbein, at 1353.

[10] *See Mathews v. Chevron Corp.*, 362 F.3d 1172, 1185–87 (9th Cir. 2004) (ordering that employer pay plaintiffs " 'sums of money' equivalent to the . . . benefits they lost because of [employer's] breach," through vehicle of "instatement" of plaintiffs into benefits plan).

the Seventh Circuit has called a "morass" for courts and parties attempting to apply Section 502(a)(3). *See Brosted v. Unum Life Ins. Co. of Am.*, 421 F.3d 459, 466 (7th Cir. 2005). As demonstrated above in Section I, the lower courts' attempts to follow *Mertens* are a dismal catalogue of inconsistent reasoning and unpredictable outcomes.

4. The trust-law tradition that Congress invoked in drafting ERISA unquestionably provided for make-whole monetary relief against breaching fiduciaries, as demonstrated above in Section II and as the *Mertens* court acknowledged. *Mertens,* 508 U.S. at 256. Nothing suggests that Congress intended to depart from this tradition in creating ERISA's enforcement scheme. Certiorari should be granted in this case so that the Court may bring its interpretation of Section 502(a)(3) in line with Congressional intent and all other areas of ERISA jurisprudence, which acknowledge the trust-law basis of the statute.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

TERESA S. RENAKER
JEFFREY GREG LEWIS
Counsel of Record
MARGARET E. HASSELMAN
LEWIS, FEINBERG, LEE,
RENAKER & JACKSON, P.C.
1330 Broadway, Suite 1800
Oakland, CA 94612
(510) 839-6824

Attorneys for Petitioner

2007 WL 495191

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LOUIS GERARD GOERES, Plaintiff-Appellant, v. CHARLES SCHWAB & CO., INC.; et al., Defendants-Appellees,	No. 05-15282 D.C. No. CV-04-01917-CRB MEMORANDUM* (Filed Feb. 14, 2007)

Appeal from the United States District Court
for the Northern District of California
Charles R. Breyer, District Judge, Presiding

Argued and Submitted February 12, 2007
San Francisco, California

Before: REINHARDT, RYMER, and SILVERMAN, Circuit Judges.

We affirm for the reasons stated by the district court in its order granting the motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). The Supreme Court's recent decision in *Sereboff v. Mid Atlantic Med. Servs., Inc.*, 126 S.Ct. 1869, 1875 (2006), does not undermine the district

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

court's reasoning and *Peralta v. Hispanic Business, Inc.*, 419 F.3d 1064, 1076 (9th Cir. 2005), supports it.

AFFIRMED.

2004 WL 2203474

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

LOUIS GERARD GOERES,

Plaintiff,

v.

CHARLES SCHWAB & CO., INC., et al.,

Defendants. /

No. C 04-01917 CRB

MEMORANDUM AND ORDER

This is an action pursuant to section 502(a)(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"). Now before the Court is defendants' motion to dismiss for failure to state a claim upon which relief can be granted (Fed. R. Civ. Proc. 12(b)(6)). After carefully considering the parties' submissions, and having had the benefit of oral argument, defendants' motion to dismiss is GRANTED.

ALLEGATIONS OF THE COMPLAINT

Plaintiff Louis Gerard Goeres was a beneficiary of a SchwabPlan Retirement Savings and Investment Plan ("Retirement Plan"). Plaintiff was designated as a beneficiary by his late domestic partner, Stephen M. Ward, who was a Schwab employee and participant in the Retirement Plan. Complaint ¶ 4.

Plaintiff and Mr. Ward were domestic partners from November 1988 until Mr. Ward's death in December 1999. *Id.* ¶ 8. On September 18, 1992, Mr. Ward designated plaintiff as his primary beneficiary under the Retirement

Plan. Complaint ¶ 12. The beneficiary designation form was countersigned by a Schwab benefits representative on that same date. *Id.* Plaintiff did not have a copy of the 1992 beneficiary designation form until Schwab provided one to him in August 2003. *Id.* ¶ 14.

In January 2000, plaintiff informed Schwab's human resources department of Mr. Ward's death. *Id.* ¶ 16. At this time, plaintiff was receiving benefits as Mr. Ward's domestic partner under Schwab's employee welfare benefit plans, including medical, dental, and vision care plans. *Id.* ¶ 15. Plaintiff was told that he would be contacted about Mr. Ward's Retirement Plan after he submitted Mr. Ward's death certificate. *Id.* ¶ 16. Plaintiff submitted the death certificate but was never contacted about the Retirement Plan. *Id.* ¶ 17. In January or February 2000, plaintiff contacted Schwab Retirement Plan Services and was told that he was not the designated beneficiary on Mr. Ward's Retirement Plan account. *Id.* ¶ 18. Mr. Ward's sister contacted Schwab Retirement Plan Services in "early 2000," and was also told that plaintiff was not the designated beneficiary of Mr. Ward's Retirement Plan account. *Id.* ¶ 19.

On May 15, 2001, Schwab Retirement Plan Services contacted plaintiff because it had "recently learned of Mr. Ward's death and that plaintiff was the designated beneficiary of Mr. Ward's Retirement Plan account." *Id.* ¶ 22. This occurred about sixteen months after plaintiff first notified Schwab of Mr. Ward's death. Schwab Retirement Plan Services sent plaintiff the application for Plan benefits and other materials at this time. *Id.* ¶ 21. Plaintiff claims that these materials failed to adequately inform him of his distribution options as a non-spouse beneficiary. *Id.* ¶ 24.

On December 31, 1999, which was around the time of Mr. Ward's death, Mr. Ward's retirement account was valued at approximately $1.2 million. *Id.* ¶ 27. On June 30, 2000, Mr. Ward's retirement account was valued at approximately $1.6 million. *Id.* ¶ 28. Plaintiff collected the proceeds of the Retirement Plan in 2004, when it was valued at approximately $565,000. *Id.* ¶ 30.

Plaintiff claims that he received significantly less money than he would have received had defendants promptly notified him of his beneficiary status and adequately informed him of his benefit distribution options. The drop in the stock market coupled with the failure to timely notify plaintiff of his beneficiary status resulted in a loss to plaintiff of more than $500,000.

Plaintiff brought suit against three defendants: (1) Schwab; (2) Schwab Retirement Plan Services, Inc. ("Schwab Retirement Plan Services"); and (3) the Administrative Committee of the SchwabPlan Retirement Savings and Investment Plan (the "Administrative Committee"). Plaintiff claims that all three defendants were fiduciaries of the Retirement Plan within the meaning of ERISA, and all three breached their fiduciary duties by failing to notify plaintiff that he was the beneficiary of an ERISA retirement plan. Complaint ¶ 36. Plaintiff claims that he is entitled to equitable relief pursuant to ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3) (hereinafter "section 1132(a)(3)"). Namely, plaintiff wants the Retirement Plan's records modified to reflect plaintiff's entitlement to a distribution of Mr. Ward's retirement account as of a date no later than June 30, 2000. Complaint at 7.

DISCUSSION

1. Legal Standard

A motion to dismiss should be granted where the complaint fails to allege sufficient facts to constitute a cognizable claim or legal theory of recovery. *See* Fed. R. Civ. P. 12(b)(6). A court cannot grant a motion to dismiss pursuant to Rule 12(b)(6) unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). In evaluating a Rule 12(b)(6) motion, a complaint is construed in the light most favorable to the plaintiff. *See Firoozye v. Earthlink Network,* 153 F.Supp.2d 1115, 1119 (N.D. Cal. 2001). The court must accept as true all material allegations in the complaint as well as the reasonable inferences to be drawn from them. *See Usher v. City of Los Angeles,* 828 F.2d 556, 561 (9th Cir. 1987). Dismissal is disfavored and should be granted only in "extraordinary" cases. *See United States v. Redwood City,* 640 F.2d 963, 966 (9th Cir. 1981).

2. No Relief can be Granted on Plaintiff's Principal Claim as a Matter of Law

A. The Relief Plaintiff Seeks is Legal, not Equitable

Plaintiff seeks to modify the Retirement Plan's records to reflect plaintiff's entitlement to a distribution of Mr. Ward's retirement account as of a date no later than June 30, 2000. Plaintiff maintains that such relief is permissible under section 1132(a)(3). Defendants argue that this claim fails as a matter of law because only equitable relief is available under ERISA and the relief plaintiff seeks is legal.

Section 1132(a)(3) provides:

> A civil action may be brought by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, **or** (B) **to obtain other appropriate equitable relief** (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan.

29 U.S.C. § 1132(a)(3) (2004) (emphasis added). The meaning and scope of the "equitable relief" allowed under this section is the chief issue here.

A recent Supreme Court decision addressed the meaning of "equitable relief" in section 1132(a)(3). The plaintiff in *Great-West Life & Annuity Insurance Co. v. Knudson,* 534 U.S. 204 (2002), was an ERISA health-plan ("Plan") beneficiary who became paralyzed in a car accident. Plan provisions required the Plan to be reimbursed by third-party tortfeasors. *Id.* at 207. The Plan also assigned its right to litigate any claims under the reimbursement provisions to Great-West. *Id.* The plaintiff received a settlement from a third party tortfeasor. *Id.* Thereafter, Great-West sued the plaintiff (hereinafter "respondent") to require her to reimburse Great-West the sum it spent on her medical care. *Id.* at 208.

Upon review, the Supreme Court discussed the equitable remedies available under section 1132(a)(3). First, the Court recognized its own precedent declaring "equitable relief" in section 1132(a)(3) as "'those categories of relief that were typically available in equity.'" *Id.* at 210 (*quoting Mertens v. Hewitt Assocs.,* 508 U.S. 248 (1993)). The Court acknowledged that Great-West was seeking to impose personal liability on the respondent for a

contractual obligation to pay money, which is relief that was not typically available in equity. *Knudson,* 534 U.S. at 210. Money damages, the Court explained, is the classic form of legal relief. *Id.* (emphasis in original) (citation omitted).

Great-West also argued that it was seeking equitable relief because it sought to "enjoin an act or practice" that violated the terms of the Plan, i.e., the respondent's failure to reimburse the Plan. *Id.* at 210 (internal citations omitted). The Court, however, pointed out that an injunction to compel the payment of money or specific performance of a contract to pay money was not typically available in equity. *Id.* at 211.

Plaintiff here asserts that he seeks equitable relief because he is requesting an order that defendants (1) "take all steps necessary" to place plaintiff in the position he would have been in but for the breach of fiduciary duty and (2) to "modify" the records to reflect plaintiff's entitlement to a distribution of Mr. Ward's account at a higher value. *See* Complaint at 7. That plaintiff asks to be restored to a previous status, i.e., his June 2000 beneficiary status, rather than an order compelling the payment of money, does not make the relief he seeks equitable. "In determining whether an action for equitable relief is properly brought under ERISA, we look to the substance of the remedy sought . . . rather than the label placed on that remedy." *Westaff Inc., v. Arce*, 298 F.3d 1164, 1166 (9th Cir. 2002) (citation omitted). A court order modifying the Retirement Plan records to reflect that plaintiff was entitled to a distribution of benefits no later than June 30, 2000 would be meaningless unless it meant that defendants must pay plaintiff the value of the account on that date. Thus, what plaintiff is actually seeking is his monetary damages

arising from defendants' failure to timely notify him of his beneficiary status.

Plaintiff cannot make his legal remedy "equitable" by splitting it into two actions. At the hearing on this motion, plaintiff characterized his request for equitable relief as the first step in a two-step process. Plaintiff argued that placing him back into the Retirement Plan as of a certain date is equitable relief, regardless of what flows from such relief. Once in his desired position, plaintiff would bring suit under ERISA section 501(a)(1) to recover benefits due to him under the terms of the Retirement Plan. *See* 29 U.S.C. § 501(a)(1). Bifurcating this process, however, does not make the requested relief equitable; the substance of the remedy plaintiff seeks remains monetary compensation. *See Arce*, 298 F.3d at 1166.

B. Even if Defendants Breached a Fiduciary Duty, Plaintiff has no Viable Claim upon which Relief can be Granted

Plaintiff distinguishes his case from *Knudson* by focusing on defendants' breach of fiduciary duty. Plaintiff argues that even if his claim may be characterized as a claim for monetary relief, compensating a beneficiary for losses sustained as a result of a breach of fiduciary duty was typically available in equity. Opposition at 6-7.

The allegation that defendants breached a fiduciary duty is irrelevant under controlling case law. For example, in one Ninth Circuit case, an employee sued her employer's ERISA plan administrator for failing to notify her that she had become eligible for coverage under a cancer insurance policy. *McLeod v. Oregon Lithoprint Inc.*, 102 F.3d 376, 377 (9th Cir. 1996). The employee developed

cancer and sued under section 1132(a)(3) for the amount that would have been paid on her behalf had she been properly notified of her eligibility for the cancer coverage. *Id. McLeod* found that the employee was not seeking equitable relief but rather "to be made whole through an award of money damages equal in amount to the benefits that she would have been paid . . . " *Id.* at 378. *McLeod* rejected the employee's argument that "appropriate equitable relief" should include monetary relief because without monetary relief she had no adequate remedy. *Id.* at 378. Instead, *McLeod* declared that "the status of a defendant, whether fiduciary or nonfiduciary, does not affect the question of whether damages constitute 'appropriate equitable relief' under [§ 1132(a)(3)]." *Id. See also Farr v. U.S. West Communs., Inc.,* 151 F.3d 908, 916 (9th Cir. 1998), *amended by* 179 F.3d 1252 (9th Cir. 1999) (holding that even though defendant employers breached their fiduciary duties by failing to notify pension benefit recipients of the tax consequences of an early retirement incentive, the damages sought by the plaintiffs – monetary reimbursements equal to the amount they paid in taxes – were not recoverable as "other appropriate equitable relief" under ERISA section 1132(a)(3)). *McLeod* and *Farr* clarify that suing a fiduciary does not transform monetary damages into "appropriate equitable relief" under ERISA.

C. Plaintiff's Situation is Materially Different from *Mathews*

Plaintiff relies heavily on a case where an employer ("Chevron") breached its fiduciary duty under ERISA by "actively misinforming" certain employees of their retirement options. *Mathews v. Chevron Corp.*, 362 F.3d 1172, 1183-1185 (9th Cir. 2004). *Mathews* confirmed that ordering Chevron to

modify the employees' retirement-plan records to give them the retirement benefits they would have received had Chevron not actively misinformed them was appropriate equitable relief pursuant to section 1132(a)(3). *See id.* at 1186. Chevron argued that because modifying the plan records would result in paying the employees sums of money, such relief was precluded by section 1132(a)(3). *Id.* at 1185-86. *Mathews* disagreed and decided that such relief was appropriate.

> On its face, an order to modify plan records is not an award of monetary damages. More importantly, the relief granted by the district court here is also equitable in substance. To instate the [employees] retroactively into [the retirement plan] simply puts them in the position they would have been had Chevron not breached its fiduciary duty. . . Although in this instance the [] remedy will result in Chevron paying [] sums of money equivalent to the [] benefits they lost because of Chevron's breach, the mere payment of money does not necessarily render the award compensatory monetary damages.

Id. at 1186.

Plaintiff similarly argues that modifying the Retirement Plan records to place him in the [financial] position he would have been in had defendants not breached their fiduciary duty is still equitable relief, even if it may result in defendants paying plaintiff money. *Mathews* is materially distinguishable from the facts alleged here. The relief the *Mathews* plaintiffs received was in statement into a retirement plan to which they should have been notified. This relief rendered them participants of a particular retirement plan – a plan that existed at that time. Incidently, instating the *Mathews* plaintiffs into the

retirement plan resulted in their receiving sums of money from Chevron, but it was money Chevron should have paid the plaintiffs in the first place.

In contrast, there is no plan into which plaintiff can be "instated." Plaintiff collected his partner's Retirement Plan proceeds in May 2004 and there is nothing left to distribute. Moreover, unlike the *Mathews* plaintiffs, plaintiff here does not seek benefits that defendants should have paid him but for their breach of fiduciary duty. Rather, the Retirement Plan required defendants to pay plaintiff the value of the retirement account, and this is what they paid him. Plaintiff now seeks to recover for the loss of the value of that account caused by defendants' negligence, but such a claim is legal.

3. The Appropriate Defendants

Plaintiff brought his claim against (1) Schwab; (2) Schwab Retirement Plan Services; and (3) the Administrative Committee. Plaintiff alleges that all three defendants were fiduciaries of the Retirement Plan within the meaning of ERISA, and all three defendants breached their fiduciary duties. Complaint ¶ 36.

Defendants argue that plaintiff states no claim sufficient to give rise to liability against both Schwab and the Administrative Committee. Motion at 8:16-17. Defendants also argue that plaintiff's complaint does not provide "fair notice" of his claims against these defendants and the ground on which they rest. Therefore, defendants argue that plaintiff's claims against both Schwab and the Administrative Committee should be dismissed. Motion at 9-10.

It is not necessary to determine which are the appropriate defendants at this juncture. As discussed above, plaintiff states no claim upon which relief may be granted, and the claim fails regardless of who the appropriate defendants are.

CONCLUSION

Plaintiff brought this action pursuant only to ERISA section 1132(a)(3), which provides for "appropriate equitable relief." No matter how he characterizes it, plaintiff seeks to recover for the loss of the value of the Retirement Plan due to defendants' negligence. This claim for relief is legal, not equitable. Unfortunately, the Supreme Court has held that legal relief is not available under ERISA section 1132(a)(3). Therefore, plaintiff's claim fails as a matter of law. Accordingly, the Court GRANTS defendants' motion to dismiss for failure to state a claim upon which relief can be granted.

Plaintiff also asks for "an injunction compelling defendants to establish and maintain a reasonable claims procedure for the Retirement Plan that ensures that non-spouse beneficiaries timely receive applications for Retirement Plan benefits." Complaint at 7. This Order does not dismiss the request for such injunctive relief. A case management conference will be held on October 22, 2004 at 8:30 a.m.

IT IS SO ORDERED.

Dated: September 28, 2004

/s/
CHARLES R. BREYER
UNITED STATES
DISTRICT JUDGE

69

(2)

No. 06-1521

FILED
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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

LOUIS GERARD GOERES,

Petitioner,

v.

CHARLES SCHWAB & CO., INC., SCHWAB RETIREMENT PLAN SERVICES, INC., and ADMINISTRATIVE COMMITTEE OF THE SCHWABPLAN RETIREMENT SAVINGS AND INVESTMENT PLAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

KIM ZELDIN
Counsel of Record
RONALD S. KRAVITZ
LINER YANKELEVITZ SUNSHINE & REGENSTREIF LLP
199 Fremont Street, 20th Floor
San Francisco, CA 94105
(415) 489-7700

Counsel for Respondents

211515

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether this Court should grant certiorari to review a question as to which the circuits are not in conflict, *i.e.*, whether a former beneficiary of a 401(k) plan can recover, as "equitable relief" under Section 502(a)(3) of ERISA, monetary damages allegedly resulting from a breach of fiduciary duty affecting the value of his plan account.

LIST OF PARTIES AND DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

The names of all parties to this proceeding are contained in the caption of this case.

Respondent Charles Schwab & Co., Inc. is a 100%-owned subsidiary of Schwab Holdings, Inc., which is a 100%-owned subsidiary of The Charles Schwab Corp., a publicly held corporation.

Respondent Schwab Retirement Plan Services, Inc. is a 100%-owned subsidiary of The Charles Schwab Corp., a publicly held corporation.

Respondent Administrative Committee of The SchwabPlan Retirement Savings and Investment Plan has no parent corporation and no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES AND DISCLOSURE STATEMENT PURSUANT TO RULE 29.6	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	v
COUNTERSTATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	4
I. The Court Of Appeals Correctly Applied This Court's Settled Construction Of ERISA Section 502(a)(3)	4
A. *Great-West* And *Mertens*	5
B. Petitioner Improperly Seeks Monetary Losses Caused By The Decline In The Value Of Schwab Stock And The Alleged Delay In Receiving His Benefits	7
C. Trust Principles Do Not Support Petitioner's Position	8
II. The Court Of Appeals' Determination That Section 502(a)(3) Does Not Provide For Monetary Relief Does Not Create A Conflict In The Circuit Courts	9

Contents

Page

III. Petitioner's Interpretation Of Section 502(a)(3) Does Not Create An Issue Of Exceptional Importance 11

CONCLUSION 12

TABLE OF CITED AUTHORITIES

Page

Cases

Armstrong v. Jefferson Smurfit Corp., 30 F.3d 11 (1st Cir. 1994) 10

Bowen v. Mass., 487 U.S. 879 (1988) 6

Calhoon v. Trans World Airlines, Inc., 400 F.3d 593 (8th Cir. 2005) 9

Callery v. U.S. Life Ins. Co., 392 F.3d 401 (10th Cir. 2004) 8

Carpenters Health & Welfare Trust for S. Cal. v. Vonderharr, 384 F.3d 667 (9th Cir. 2004) 6

Crosby v. Bowater Inc. Ret. Plan, 382 F.3d 587 (6th Cir. 2004) 8, 10

Great-West Life & Annuity Co. v. Knudson, 534 U.S. 204 (2002) ..... *passim*

Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238 (2000) 5

Helfrich v. PNC Bank, Ky., Inc., 267 F.3d 477 (6th Cir. 2001) 9

In re Schering-Plough Corp. ERISA Litig., 420 F.3d 231 (3d Cir. 2005) 10

Cited Authorities

Page

LaRue v. DeWolff, Boberg & Assocs., Inc., 450 F.3d 570 (4th Cir. 2006) 9

Mathews v. Chevron Corp., 362 F.3d 1172 (9th Cir. 2004) 9

Mertens v. Hewitt Assocs., 508 U.S. 248 (1993) ..*passim*

Peralta v. Hispanic Bus., Inc., 419 F.3d 1064 (9th Cir. 2005) 4

Rego v. Westvaco Corp., 319 F.3d 140 (4th Cir. 2003) 6

Sereboff v. Mid Atl. Med. Servs., Inc., 126 S. Ct. 1869 (2006) 4

Tittle v. Enron Corp. (In re Enron Corp. Sec., Derivative & "ERISA" Litig.), 284 F. Supp. 2d 511 (S.D. Tex. 2003) 8, 10

Todisco v. Verizon Commc'ns, Inc., No. 06-1957, 2007 WL 2231733 (1st Cir. Aug. 6, 2007) 9

Watkins v. Westinghouse Hanford Co., 12 F.3d 1517 (9th Cir. 1993) 6

Cited Authorities

Page

Statutes

ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) . . . . . *passim*

COUNTERSTATEMENT OF THE CASE

Petitioner Louis Gerard Goeres ("Petitioner") alleges that he was the beneficiary of the plan account of his domestic partner, Stephen M. Ward, a participant in the SchwabPlan Retirement Savings and Investment Plan (the "Plan").[1] Petitioner further alleges that Respondents Charles Schwab & Co., Inc., Schwab Retirement Plan Services, Inc.,[2] and Administrative Committee of the SchwabPlan Retirement Savings and Investment Plan ("Respondents") breached their fiduciary duties with respect to his right to benefits under the Plan, resulting in monetary losses exceeding $1,000,000.[3]

Specifically, in his complaint filed on May 14, 2004 in the Northern District of California ("District Court"), Petitioner alleges that Mr. Ward completed a beneficiary designation form naming Petitioner as his primary beneficiary under the Plan.[4] In January 2000, Petitioner informed Schwab of Mr. Ward's death and later provided Schwab with the death certificate.[5] Petitioner then alleges he contacted (in January or February 2000) Schwab Retirement Plan Services and erroneously was told that he was not Mr. Ward's beneficiary.[6]

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[1] Pet. App. 3.

[2] Schwab Retirement Plan Services, Inc. is a record keeper and not a fiduciary under the Plan.

[3] Pet. App. 5.

[4] Pet. App. 3-4.

[5] Pet. App. 4.

[6] Pet. App. 4.

Petitioner claims he did not receive notice he was the beneficiary until May 15, 2001, and that the notice did not adequately inform him of his distribution options as a non-spouse beneficiary.[7]

Petitioner further alleges that these acts caused him monetary harm through "investment losses." He alleges that the value of Mr. Ward's plan account was $1.2 million in December 1999, the month of Mr. Ward's death, that the value of the stock in the account increased to $1.6 million as of June 30, 2000, and that the value of the stock decreased to approximately $565,000 in 2004 when Petitioner requested a distribution of the then-full value of the account from the Plan.[8] Petitioner asserts that the investment losses would have been avoided had Respondents provided him with an application for benefits in a timely fashion after Mr. Ward's death and had Respondents adequately informed him of his benefit distribution options.[9]

Petitioner sought "injunctive and other equitable relief" under Section 502(a)(3) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132(a)(3).[10] In particular, Petitioner asked that the District Court:

> [o]rder that Defendants, and each of them, take all steps necessary to place Plaintiff in the position

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[7] Pet. App. 4.

[8] Pet. App. 5. The account held Schwab stock and a few small mutual fund positions.

[9] Pet. App. 5.

[10] Complaint ¶ 37, R.E. 7.

> he would have been in had Defendants not breached their fiduciary duty, including, but not limited to, modifying the Retirement Plan's records to reflect Plaintiff's entitlement to a distribution of Mr. Ward's account valued as of a date no later than June 30, 2000.[11]

On July 1, 2004 Respondents moved to dismiss the Complaint for failure to state a claim upon which relief could be granted.[12] In a Memorandum and Order dated September 28, 2004, the District Court granted Respondents' motion to dismiss, except as to Petitioner's request for an injunction.[13] Petitioner appealed the case to the United States Court of Appeals for the Ninth Circuit.[14] After briefing and oral argument, the Ninth Circuit affirmed the District Court's opinion.[15] Petitioner filed a timely petition for a writ of certiorari.[16]

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[11] Complaint ¶ C of Prayer for Relief, R.E. 7.

[12] *See* Pet. App. 3; *see* U.S. District Court, California Northern District, Civil Docket for Case # 3:04-cv-01917-CRB Doc. 5, R.E. 22.

[13] Pet. App. 13. Petitioner subsequently withdrew his prayer for injunctive relief pursuant to a stipulation of the parties. *See* U.S. District Court, California Northern District, Civil Docket for Case # 3:04-cv-01917-CRB Doc. 31, R.E. 24.

[14] Notice of Appeal, R.E. 17-18.

[15] Pet. App. 1-2.

[16] *See* Pet. Br.

REASONS FOR DENYING THE PETITION

I. The Court Of Appeals Correctly Applied This Court's Settled Construction Of ERISA Section 502(a)(3)

The Ninth Circuit Court of Appeals unanimously affirmed the District Court's decision for the reasons stated by the District Court in its order granting the motion to dismiss, noting that *Sereboff v. Mid Atlantic Medical Services, Inc.*, 126 S. Ct. 1869, 1875 (2006) did not undermine the decision and that *Peralta v. Hispanic Business, Inc.*, 419 F.3d 1064, 1076 (9th Cir. 2005) supports it.[17]

To dismiss Petitioner's complaint, the District Court followed *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002), underscoring that the substance of the remedy Petitioner seeks is monetary compensation (the loss in profits caused by the decline of the Schwab stock) and rejecting Petitioner's claim that monetary relief typically was available in claims against fiduciaries in courts of equity. The District Court noted that suing a fiduciary does not transform monetary damages into appropriate equitable relief.[18]

Ignoring the plain language of Section 502(a)(3) and misconstruing Supreme Court and Ninth Circuit precedent, Petitioner argues that monetary relief against "breaching fiduciaries was typically and exclusively available in equity" and therefore all actions by participants or beneficiaries against fiduciaries are "equitable" and within the meaning

[17] Pet. App. 1-2.

[18] Pet. App. 10.

of ERISA Section 502(a)(3), regardless of whether the relief would be legal in nature if sought against a non-fiduciary. Petitioner's unsupported arguments have no basis in existing law and should by rejected by the Court.

A. *Great-West* And *Mertens*

In *Great-West* and *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), the Supreme Court made clear that only equitable relief may be obtained for breach of fiduciary duty under ERISA Section 502(a)(3), which authorizes a civil action

> by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan.

29 U.S.C. § 1132(a)(3) (2004).[19] The phrase "equitable relief" refers "to those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." *Mertens*, 508 U.S. at 256. On the other hand, money damages, such as those Petitioner seeks, are "the classic form of *legal* relief." *Id.* at 255.

> "Almost invariably . . . suits seeking (whether by [way of] judgment, injunction, or declaration) to

[19] Notably, the language of the statute does not draw any distinction between equitable relief available against fiduciaries versus non-fiduciaries. The Supreme Court has ruled that ERISA Section 502(a)(3) actions are available against fiduciaries and non-fiduciaries. *Harris Trust & Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 249-53 (2000).

> compel the defendant to pay a sum of money . . . are suits for 'money damages,' as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty."

Great-West, 534 U.S. at 210 (quoting *Bowen v. Mass.*, 487 U.S. 879, 918-19 (1988) (Scalia, J., dissenting)).

Through its emphasis on "categories of relief," the Court has made clear that in determining whether requested relief falls within the meaning of "appropriate equitable relief" under ERISA Section 502(a)(3), the key issue is the basis for the plaintiff's claim and the nature of the underlying remedy sought. *See id.* at 213; *see Mertens*, 508 U.S. at 255-59.

In *Mertens*, the Court specifically rejected an interpretation of the statute that would extend the relief obtainable under ERISA Section 502(a)(3) to whatever relief a court of equity is empowered to provide. *See* 508 U.S. at 257-58. The Court concluded that such a reading would "render the modifier ['equitable'] superfluous." *Id.* at 258.

The lower courts followed the distinction explained by *Mertens*. *See Carpenters Health & Welfare Trust for S. Cal. v. Vonderharr*, 384 F.3d 667, 671 (9th Cir. 2004) (the "critical factor" is the substance of the remedy (citing *Watkins v. Westinghouse Hanford Co.*, 12 F.3d 1517, 1527-28 n.5 (9th Cir. 1993)); *see also Rego v. Westvaco Corp.*, 319 F.3d 140, 145 (4th Cir. 2003) ("Under *Mertens*, then, the relevant question is not whether a given type of case would have been brought in a court of equity, but whether a given type of relief was available in equity courts as a general rule."). In short,

the Court's reasoning in *Great-West* and *Mertens* directly precludes Petitioner's argument that whether the type of action was historically brought in courts of equity determines whether the relief is "equitable."

B. Petitioner Improperly Seeks Monetary Losses Caused By The Decline In The Value Of Schwab Stock And The Alleged Delay In Receiving His Benefits

Petitioner's claim seeking the difference between the value of his account when it was paid and what he contends it would have been worth in the absence of Respondents' alleged negligence is one for money damages, a quintessentially legal remedy. Petitioner implicitly accepts that the remedy he seeks is monetary damages and that if Respondents were non-fiduciaries, the relief he seeks could *not* be characterized as "equitable relief" or brought under ERISA Section 502(a)(3). He argues a suit by a beneficiary against a fiduciary for money damages is always a claim for equitable relief because courts of equity decided virtually all breach of trust actions. This contention contradicts the plain language of ERISA and the prior decisions of this Court, which hold that it is the substance of the remedy sought, not the type of claim or defendant, that determines whether the requested relief is appropriate under ERISA Section 502(a)(3). *See, e.g., Great-West*, 534 U.S. at 213.

In addition to the Supreme Court's decisions, all circuit courts to have directly considered Petitioner's argument after this Court decided *Great-West* have rejected his position that claims for monetary damages by a participant or beneficiary against a fiduciary constitute claims for appropriate equitable relief within the meaning of Section 502(a)(3). *See infra* Part II.

C. Trust Principles Do Not Support Petitioner's Position

Lacking any argument based on the plain meaning of Section 502(a)(3) and valid case law to support his position, Petitioner argues that the monetary remedy he seeks is "equitable relief" because courts of equity historically resolved suits against fiduciaries for breach of trust. This is irrelevant. The Supreme Court has noted that in *Mertens* it specifically considered and "rejected the claim that the special equity-court powers applicable to trusts define the reach of § 502(a)(3)." *Great-West*, 534 U.S. at 219; *see Mertens*, 508 U.S. at 256-57. Therefore, Petitioner's blanket reliance on statements made in trust law treatises regarding the type of causes of action historically decided by equity courts is misplaced.[20]

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[20] *See Callery v. U.S. Life Ins. Co.*, 392 F.3d 401, 409 (10th Cir. 2004) ("While the arguments of amici that we should look to the common law of trusts and award monetary damages pursuant to an equitable breach of trust by a fiduciary may have been compelling before *Great-West*, they are not so now."); *Crosby v. Bowater Inc. Ret. Plan*, 382 F.3d 587, 596 (6th Cir. 2004) ("If it be argued that Mr. Crosby's position should be likened to that of a beneficiary of a trust, who could invoke the jurisdiction of an equity court to enforce a right to receive money from the trust, the short answer is that just such an argument has been explicitly rejected by the United States Supreme Court.") (citing *Great-West*, 534 U.S. at 219); *Rego*, 319 F.3d at 145 ("[T]he scope of [available] relief is emphatically not defined by reference to the 'many situations' at common law 'in which an equity court could establish purely legal rights and grant legal remedies which would otherwise be beyond the scope of its authority.'" (quoting *Mertens*, 508 U.S. at 256)); *Tittle v. Enron Corp. (In re Enron Corp. Sec., Derivative & "ERISA" Litig.)*, 284 F. Supp. 2d 511, 607-12 (S.D. Tex. 2003) (explaining and rejecting detailed (Cont'd)

II. The Court Of Appeals' Determination That Section 502(a)(3) Does Not Provide For Monetary Relief Does Not Create A Conflict In The Circuit Courts

The six Courts of Appeal (the First, Fourth, Sixth, Eighth, Ninth, and Tenth Circuits) to consider Petitioner's argument after the Supreme Court decided *Great-West* have flatly rejected it. *See Todisco v. Verizon Commc'ns, Inc.*, No. 06-1957, 2007 WL 2231733 (1st Cir. Aug. 6, 2007) (rejecting plaintiff's claim for compensatory monetary damages to which plaintiff claimed she was entitled due to defendant's failure to honor its oral representations); *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 450 F.3d 570, 574-77 (4th Cir. 2006), *cert. granted* 127 S. Ct. 1393 (Feb. 26, 2007) (affirming denial of monetary damages for amount by which plaintiff's retirement account would have appreciated had defendant implemented plaintiff's investment strategy as instructed); *Calhoon v. Trans World Airlines, Inc.*, 400 F.3d 593, 598 (8th Cir. 2005) (rejecting attempted distinction between fiduciaries and non-fiduciaries, the court noted that

> *Great-West*'s broadly phrased reasoning forecloses such an argument, . . . for the Court looked only to "the nature of the relief sought" and whether it was a category of relief that was typically available in equity); *Callery v. U.S. Life Ins. Co.*, 392 F.3d

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(Cont'd)
argument based on trust law treatises discussing actions against trustees in equity); *see also Helfrich v. PNC Bank, Ky., Inc.*, 267 F.3d 477, 482 (6th Cir. 2001) (money damages are not available in an action based on Section 1132(a)(3) (citing *Mertens*, 508 U.S. at 255)). Moreover, the Ninth Circuit applied *Great-West* to an ERISA fiduciary breach action in *Mathews v. Chevron Corp.*, 362 F.3d 1172 (9th Cir. 2004) and gave no credence to Petitioner's argument.

> 401, 408-09 (10th Cir. 2004) (affirming judgment on the pleadings in favor of defendant on claim brought against fiduciary for face value of insurance policy); *Crosby v. Bowater Inc. Ret. Plan*, 382 F.3d 587, 596 (6th Cir. 2004) (rejecting claim by plan participant against plan administrator under ERISA Section 502(a)(3) for additional lump sum benefits allegedly owed and noting that it "is a distinction without a difference"

that the case does not involve liability that is contractual in nature); *Rego*, 319 F.3d at 145 (noting the Supreme Court has "squarely rejected" the argument that any remedy when sought for breach of fiduciary duty is always an equitable remedy); *see also Tittle v. Enron Corp. (In re Enron Corp. Sec., Derivative & "ERISA" Litig.)*, 284 F. Supp. 2d 511, 610-12 (S.D. Tex. 2003) (same).[21]

Petitioner cites no post *Great-West* cases that have considered his argument and accepted it.

The clear lack of a conflict in the circuit courts regarding Petitioner's Section 502(a)(3) argument warrants denial of his petition for certiorari. This case, unlike the *LaRue* case currently pending before this Court, does not involve a claim under ERISA Section 502(a)(2). The *LaRue* decision created a conflict in the circuit courts regarding the application of 502(a)(2). *See, e.g., In re Schering-Plough Corp. ERISA Litig.*, 420 F.3d 231 (3d Cir. 2005). If the Court does not

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[21] *See also Armstrong v. Jefferson Smurfit Corp.*, 30 F.3d 11, 13 (1st Cir. 1994) (pre-*Great-West*, but post-*Mertens*, case rejecting "rather weak" argument focused on distinction between suits against fiduciaries and those against non-fiduciaries).

reach the distinct Section 502(a)(3) question presented in *LaRue*, it should not grant certiorari to address that question here because there is no circuit conflict warranting review.

III. Petitioner's Interpretation Of Section 502(a)(3) Does Not Create An Issue Of Exceptional Importance

Petitioner incorrectly argues that the interpretation of "other equitable relief" Section 502(a)(3) is a significant and recurring remedial issue that has generated pervasive confusion and conflicting results in the lower courts. Pet. Br. 13, 21-22. In fact, *Great-West* and *Mertens* set forth a clear rule based on a plain reading of Section 502(a)(3). Petitioner may wish to change Section 502(a)(3) to allow claims for legal relief against fiduciaries who breach their fiduciary duties under ERISA; however, it is a matter for Congress and not the courts to change the law.

Petitioner incorrectly argues that should the Court not overturn the Ninth Circuit's decision, he and others like him would not have a remedy. In fact, Petitioner had several options available to him to remedy the issues relating to the delay in receiving his benefits. First, as a beneficiary, Petitioner had the option of filing a claim under Section 502(a)(1)(B) to recover benefits due under the Plan, to enforce his rights under the Plan, or to classify his rights to future benefits under the Plan. Thus, upon learning (in January or February 2000) Respondents were not going to immediately pay him, Petitioner could have made a claim for benefits instead of waiting sixteen months to receive his benefits and waiting over four years to request a distribution of the account assets. He elected not to do so. Alternatively, Petitioner immediately could have sued under Section 502(a)(3) to enforce the terms of the Plan. Instead, Petitioner

did nothing while the value of Schwab's stock (and Mr. Ward's account) plummeted.

ERISA's enforcement provision provided adequate remedies to Petitioner had he elected to pursue them in a timely manner. Petitioner's effort to expand the relief available under Section 502(a)(3) to include monetary relief is nothing more than an inappropriate attempt to change the plain meaning of Section 502(a)(3) and to shift the risk of investment loss on Respondents.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

KIM ZELDIN
Counsel of Record
RONALD S. KRAVITZ
LINER YANKELEVITZ SUNSHINE & REGENSTREIF LLP
199 Fremont Street, 20th Floor
San Francisco, CA 94105
(415) 489-7700

Counsel for Respondents